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BOOKS AND PERIODICALS.

MONEY PAID UNDER MISTAKE OF FACT. — The rule that money paid under a mistake of fact may be recovered whenever it would be against conscience for the defendant to retain it, has been vigorously attacked in a recent article. *Money paid under Mistake as to a Collateral Fact.* By Charles Henry Tuttle. 63 Albany L. J. 340 (Sept. 1901). Although this doctrine is almost universally accepted in the form above stated by both courts and text-writers, KEENER, *QUASI-CONT.*, 26, yet the author regards it as a mere appeal to the moral sense of each judge, necessarily resulting in as many conflicting decisions as judges may have variant views of correct moral principles. The science of law is thus converted into the philosophy of ethics. Stability and justice demand, to his mind, that some definite legal rule, based, in so far as is possible, on this moral principle, be adopted. The rule he suggests is that recovery of money paid under a mistake should be allowed where the mistake concerns an intrinsic fact regarding the relations between the plaintiff and the defendant, and denied where it concerns merely an extrinsic or collateral fact.

Mr. Tuttle's characterization of the present doctrine as unworthy the name of a legal rule is hardly justified. In law the rule that all contracts must conform to public policy, and in equity the rules regarding constructive trusts, employ standards fully as indefinite. In deciding what is against conscience a judge must refer, not to his own code of morals, but to that accepted generally by the community. As a result, not only is substantial justice reached, but the decisions have a satisfactory uniformity. Moreover the courts are bound to no defined course, should changed conditions present new phases of old problems. As a substitute for this doctrine, Mr. Tuttle proposes an arbitrary rule. What matters it whether a plaintiff paid money to an undeserving defendant because of a misconception of his relations to such defendant or to a third person? In either case, as the result of a mistake on the plaintiff's part, the defendant has received money for which he has given no return, and this, it is submitted, is the gist of the action. The inequitable results of the suggested doctrine may be illustrated by the following case. The drawee of a gratuitous check, acting under the mistaken belief that he holds funds belonging to the maker, cashes it for the payee. According to this rule the payee could hold the funds against the drawee, merely because the drawee's mistake concerned his relations with the maker, a third person, rather than with the payee. Yet on no principle of justice could the latter defend his position. Mr. Tuttle argues that in this class of cases, the payee having a right revocable by the maker at any time before payment, practically acts as an agent for the maker, and thus, there being only two real parties in interest at the time of payment, the mistaken fact may be treated as intrinsic. But this argument can be regarded only as an attempt to escape from the logical consequences of the author's own doctrine.

It must be admitted that the law would be simplified, and the number of litigated cases lessened, could the courts adopt some more definite rule, substantially embodying the present doctrine. But the rule here advocated, though it may prove fruitful of suggestions, hardly seems to meet the requirement. Moreover, as regards authoritative support, its terminology has been employed by only two judges, and its principle has been contradicted by a number of decisions.

ESTOPPEL AS APPLIED TO AGENCY. — In his recent work on Estoppel Mr. Ewart contended that the responsibility of principals for the contracts of agents acting with apparent authority is to be accounted for, not by the doctrine of agency, but by the law of estoppel. *EWART ON ESTOPPEL*, ch. 26. It has, however, been pointed out that where a third party makes a contract with an agent having apparent authority, the principal is bound whether the party has

knowledge of the usual course of the business in question or not, — whether he is misled by knowledge or by ignorance. But if estoppel is relied on to account for such responsibility, the principal would be liable only in the former case, since there must be a misrepresentation and a reliance thereon. 13 GREEN BAG, 50. In a recent article Mr. Ewart attempts to reinforce his position. *Estoppel by Assisted Misrepresentation*, by John S. Ewart. 35 AM. L. REV. 707 (Sept.-Oct.). The result of his argument is that persons who do not know the facts must succeed, if at all, by proving agency, whereas those who do know the facts may succeed (1) by proof of agency or (2) if there is no agency, then because of the appearance of it, by estoppel. But it is clear, since there is apparent authority, that the same evidence of the previous course of business which is necessary to prove agency in the former case will establish it in the latter, and that in every case of this class it requires the same proof to create an estoppel as it does to establish agency within apparent authority. Thus in the former case the principal's liability can be accounted for only on grounds of agency, whereas in the latter it rests upon agency or estoppel, whichever the third party may choose to invoke. *Pickering v. Bush*, 15 East 38; *Smith v. McGuire*, 3 H. & N. 554. In the second case, therefore, the two grounds, so far from excluding each other, exist side by side. The result is that while agency may be invoked to fix the responsibility of the principal in every case in this class, estoppel may, in a limited class of cases, be called in only to give the plaintiff an additional ground for recovery. If this be a correct definition of Mr. Ewart's final position, no exception to it can be taken. But it is to be noted that he thus makes a distinct limitation on the scope of his theory of estoppel, and confines its function within well recognized and proper limits. To found the principal's liability, however, upon estoppel alone is to disregard not only the doctrine that estoppel is to be invoked only when a just result can be reached in no other way, but also the historical fact that the doctrine of agency was well recognized long before courts began to use the language of estoppel.

HANDBOOK OF EQUITY JURISPRUDENCE. By James W. Eaton. St. Paul: West Publishing Co. Hornbook Series. 1901. pp. xviii, 734. 8vo.

It is a hard task to deal with so large a subject as that of equity jurisdiction in a single volume of the size of the one under consideration. As is said in the publishers' preface, "The chief difficulty arises from the great extent and variety of the subjects involved in the application of equitable doctrines," and this difficulty is apparent throughout. There is no space in which to discuss the rules laid down, and in consequence there is hardly an expression of the author's personal opinion to be found. The main principles are set forth and then various particular instances under each are stated. Every assertion of the author is supported by authorities, of which an enormous number are cited. Quotations from well known text writers also are freely inserted, to illustrate or explain, when they have hit on happy definitions or modes of expression. In this way a clear, concise statement of the law is obtained.

On the other hand, the almost entire lack of discussion makes the book hardly adequate to the needs of the beginner who wishes to acquire a thorough understanding of the subject. For the benefit of such, however, the early chapters treat the origin and history of equity, the general principles governing the exercise of the jurisdiction, and the important maxims. The growth of equity and its relation to law are shortly discussed, and the effect of modern legislation and the adoption of certain equitable principles by the common law courts are considered, in order to enable the reader to understand the true importance and limitations of this jurisdiction. Subsequently the special topics are taken up in